



“A More Egalitarian Relationship at Home and at Work”: Justice Ginsburg’s Dissent in Coleman v. Court of Appeals of Maryland

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“A MORE EGALITARIAN RELATIONSHIP AT
HOME AND AT WORK”:
JUSTICE GINSBURG’S DISSENT IN
COLEMAN V. COURT OF APPEALS OF MARYLAND

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I feel deeply honored to have this opportunity to present this essay to Justice Ginsburg. I am among the many feminists who have found wisdom and inspiration in her scholarship, her advocacy, her judicial opinions, and her life. Her work has also inspired me as a scholar and teacher of comparative law and civil procedure. Her early engagement of Swedish civil procedure helps us see the value of thinking transnationally to understand the trajectory of American law.

Justice Ginsburg took her oath of office as a U.S. Supreme Court Justice on August 10, 1993, five days after the Family and Medical Leave Act (FMLA) went into effect. Thus, 2013 marks not only the twentieth anniversary of Justice Ginsburg’s tenure on the high Court, but also the twentieth birthday of a law that aspired to help Americans “balance the demands of the workplace with the needs of families.”¹ Both events were important triumphs for legal feminism in the United States, which Justice Ginsburg played such a tremendous role in shaping and inspiring. In Justice Ginsburg’s words, FMLA was supposed to “make it feasible for women to work while sustaining family life.”² While social scientists, legal scholars, and working moms can attest that this endeavor remains a work in progress,³ Justice Ginsburg’s dissenting opinion in *Coleman v. Court of Appeals of Maryland* envisions constitutional sex equality as entailing “a more egalitarian relationship at home and at work.”⁴ It implicitly

critiques the limits of law in vindicating this ambitious commitment.

The Family and Medical Leave Act guarantees employees 12 weeks of job-protected leave to care for a newborn or ill family member, or to care for one's own serious health condition.⁵ A decade ago, the Supreme Court held that the family-care provision of the FMLA was a valid exercise of Congress's power to enforce the Equal Protection Clause. In *Nevada Department of Human Resources v. Hibbs*, the Court had upheld the family-care provisions because a statutory guarantee of such leave to men and women alike would undercut employers' incentive to discriminate against women based on their perceived likelihood of taking maternity leaves.⁶ In *Coleman*, by contrast, five Justices concluded that the self-care provision was not a valid exercise of the Fourteenth Amendment Section Five power. The plurality declared that, "[w]ithout widespread evidence of sex discrimination or sex stereotyping in the administration of sick leave, it is apparent that the congressional purpose in enacting the self-care provision is unrelated to these supposed wrongs."⁷ For the plurality, the FMLA's gender-neutral sick leave guarantee grows out of a "concern for the economic burdens on the employee and the employee's family resulting from illness-related job loss," which it explicitly distinguishes from sex discrimination.⁸

Justice Ginsburg's disagreement with her colleagues on this point stems from her recognition that the legal path towards a "more egalitarian relationship at home and at work" is immensely complicated and demanding. Digging through the legislative history of the FMLA, she recounts numerous stories of women who lost their jobs when they got pregnant or took a few weeks' maternity leave.⁹ These stories show us, without telling us, that women's full participation in the workplace requires legitimate, adequate, and sustainable institutional arrangements for pregnancy and maternity leaves. Yet, in 2012, the State of Maryland was arguing in this case that a state's refusal to provide pregnancy leave to its employees was not unconstitutional.¹⁰

In confronting Maryland's argument, Justice Ginsburg proposes revisiting the almost-forty-year-old constitutional understanding that pregnancy

discrimination is not sex discrimination.¹¹ Yet, if pregnancy discrimination were held to violate the Equal Protection Clause, would it follow that the state's failure to provide pregnancy leave to its employees is unconstitutional? Throughout the 1980s, as Justice Ginsburg recounts, American feminists debated about whether and how the law should guarantee pregnancy and childbirth leaves.¹² "Equal-treatment" feminists wanted maternity leave to be a form of gender-neutral disability leave, and viewed special maternity leaves as sex discrimination. But a 1978 California law protected maternity leave specially. Although the Supreme Court did not invalidate the California law on equal protection grounds, Justice Ginsburg reminds us that "equal-treatment" feminism became the conceptual frame of the federal FMLA.

Alternatively, many European countries provide female employees with extremely generous paid maternity leaves that last longer than the meager 12 unpaid weeks guaranteed by the FMLA.¹³ These special protections undoubtedly help working mothers reconcile the demands of work and family. But they don't disrupt the gendered patterns of working and caring that reinforce the inequalitarian relationship at home and at work.¹⁴ American feminists had a more ambitious vision for FMLA: It guaranteed medical leave in a gender-neutral fashion not only to treat men with illnesses fairly, but to disrupt the rational dynamics of discrimination against women. Entitling men to job-protected leave for illness would lead employers to incur costs by employing men, roughly equal to the costs of employing women who might become pregnant and give birth. According to the equal-treatment theory, if women need pregnancy leave in order to be full participants in the workplace, giving men a similar benefit for illness could equalize the costs of hiring men and women and would thus render it economically irrational for employers to prefer men.

As Justice Ginsburg points out, Congress agreed with this theory in enacting the self-care provision of the FMLA.¹⁵ Enacting a family-care leave without a self-care leave would be less effective in combating discrimination against women, due to the sex-role stereotype that family caregiving is women's work.¹⁶ Rightly or wrongly, employers widely assume that

women are the primary consumers of “parental” leave, regardless of its availability to both genders. By contrast, since all human beings face a wide range of serious health conditions at one time or another, pregnant women are not presumed to be the primary consumers of medical leave. Thus, while the FMLA’s family leave mandate could increase the incentive to discriminate against women, the self-care medical leave mandate was necessary to undercut that incentive.

What emerges is a highly pragmatic, yet complicated and pluralistic portrait of what constitutes sex discrimination and how it should be eliminated. Workplace discrimination includes, but should not be limited to, employers’ irrational preference for men over women based on false predictions about women’s likely behaviors after they give birth. Allowing women to sue for such straightforward discrimination is not a solution, largely because it is difficult to prove discrimination.¹⁷ According to Justice Ginsburg’s account, workplace discrimination against women also includes actions that well-meaning and rational employers adopt to avoid the real costs of pregnancy and child rearing. Congress can thus combat discrimination by making it as expensive to employ men as it is to employ women. Justice Ginsburg writes: “Essential to its design, Congress assiduously avoided a legislative package that, overall, was or would be seen as geared to women only. Congress thereby reduced employers’ incentives to prefer men over women, advanced women’s economic opportunities, and laid the foundation for a more egalitarian relationship at home and at work.”¹⁸ As reflected in these words, the project of gender justice will not succeed if it is geared to women only; it is a comprehensive reordering of men’s and women’s roles. Citing a Senate Report, Justice Ginsburg points out that the FMLA “addresses the dramatic changes that have occurred in the American workforce in recent years. . . . The once-typical American family, where the father worked for pay and the mother stayed home with the children, is vanishing.”¹⁹ The “more egalitarian relationship at home and at work” will involve changing men’s roles so that *both* mothers and fathers work for pay *and* care for the children equally. Congress laid a foundation, which the Court should not undo, and the rest of the work is up to the people.

What is most striking about Justice Ginsburg's *Coleman* dissent is that she uses her own words sparingly. The egalitarian vision that emerges in this opinion is not written solely in her voice. It is largely a collective chorus of stories and debates from the testimony of women workers and advocates before Congress, Congress's findings, and legislative text. It illustrates the nature of her ongoing commitment to a comprehensive gender equality, which will arrive not only through the enforcement of rights by courts, but through a democratic constitutionalism that can be supported, reframed, and encouraged by a wise judicial voice.²⁰



ENDNOTES

- 1 Family and Medical Leave Act, 29 U.S.C. § 2601(b)(1).
- 2 *Coleman v. Maryland Court of Appeals*, 132 S.Ct. 1327, 1349, 1460 (Ginsburg, J., dissenting) (2012).
- 3 See, e.g., ARLIE HOCHSCHILD & ANNE MACHUNG, *THE SECOND SHIFT: WORKING FAMILIES AND THE REVOLUTION AT HOME* (2012); JOAN WILLIAMS, *RESHAPING THE WORK-FAMILY DEBATE: WHY MEN AND CLASS MATTER* (2010); PAMELA STONE, *OPTING OUT: WHY WOMEN REALLY QUIT CAREERS AND HEAD HOME* (2007).
- 4 *Coleman*, 132 S.Ct. at 1350.
- 5 See Family and Medical Leave Act, 29 U.S.C. § 2612(a)(1).
- 6 *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 730-732 (2003).
- 7 *Coleman v. Maryland Court of Appeals*, 132 S.Ct. 1327, 1335 (2012).
- 8 *Id.* at 1335.
- 9 See *id.* at 1342-44 (citing testimonies by women in congressional hearings and statements in Senate reports).
- 10 See *id.* at 1344.
- 11 See *id.*
- 12 *Id.* at 1340-41.

- 13 For example, France provides 16 weeks of paid job-protected leave, C. trav. 1224-24 (Fr.), consistent with a European Union directive requiring 14 weeks of paid leave. See Council Directive 92/85 of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, art. 8, 1992 O.J. (L 348) 1 (EC).
- 14 For a more detailed account of these dynamics, see Julie C. Suk, *Are Gender Stereotypes Bad for Women? Rethinking Antidiscrimination Law and Work-Family Conflict*, 110 COLUM. L. REV. 1, 49-66 (2010).
- 15 See *Coleman*, 137 S.Ct. at 1342 (discussing and citing the briefs filed in *Cal. Fed. Sav. & Loan Assn. v. Guerra*, 479 U.S. 272 (1989)).
- 16 *Id.* at 1347 (citing testimony of U.S. Chamber of Commerce representative in 1989 congressional hearings).
- 17 *Id.* at 1346. Here, Justice Ginsburg quotes Don Butler, one of the Cal. Fed. plaintiffs, who argued that California's pregnancy leave law would lead employers to hire men instead of women. In response to the proposition that such discrimination would be illegal, he replied, "Well, that is illegal, but try to prove it."
- 18 *Id.* at 1350.
- 19 *Id.* at 1349 (quoting a 1991 Senate Report 25-26).
- 20 Shortly before her nomination to the Supreme Court, then-Judge Ginsburg invoked the good judge's ability to recognize the "felt need to act only interstitially," which "affords the most responsible room for creative, important judicial contributions." See Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1209 (1992) (quoting Gerald Gunther's remarks at her own investiture in 1980).